FLADY BIN DADING

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL APPEAL NO. 15 OF 1994]
15 JULY 1994

CRIMINAL PROCEDURE: Sentencing - Consideration of other outstanding offences - Section 171A CPC - Applicability - Consent of accused - Whether outstanding offence admitted by accused - Whether non-objection by defence Counsel to outstanding offence being taken into consideration meant consent by accused.

CRIMINAL PROCEDURE: Sentencing - Corruption - Imprisonment and fine - Delay of 5 ½ years in despatching notes of proceedings to accused - Whether inordinate - Whether accused prejudiced - Whether sentence of imprisonment ought to be set aside.

WORDS AND PHRASES: " Offence or offences which the accused admits to have committed" - Section 171A CPC.

The accused was charged with two offences under s. 4(c) Prevention of Corruption Act 1961. In the course of the trial the accused decided to plead guilty to the first charge. Both the prosecuting officer and the defence Counsel then intimated to the Court that they had no objection to the Court taking the second charge into consideration under s. 171A CPC for the purpose of sentencing the accused under the said first charge. With that the Sessions Judge read the second charge to the accused and on the accused admitting to the charge, sentenced the accused to three months imprisonment and a fine of RM 4000 in default six months imprisonment.

The accused appealed against the sentence and the issues that arose were:

(1) Whether in taking the admission of the accused with respect to the second charge herein the Sessions Judge had erred on the ground that s. 171A CPC does not mention the mentioning of the charge much less the taking of a plea thereof.
(2) Whether the non-objection by the defence Counsel to the Court taking the second charge into consideration for the purpose of sentencing the accused on the first charge, in effect amounted to consent by the accused therefor.

Held:

[1] Although the CPC is silent as to the steps that the Court should take as soon as there is agreement from the parties for an outstanding offence to be taken into consideration, the wordings " offence or offences which the accused admits to have committed " in s. 171A make it necessary for the Court to establish by way of inquiry that the accused admits his guilt with regard to the outstanding offence, which, in this case, is the offence related to the second charge. This is what the Sessions Judge had done. The Sessions Judge therefore did exactly what the law requires him to do. This is also the position in the Common Law which will apply in the face of the CPC's silence on the matter. Therefore the Judge herein had not erred when asking the accused whether he admitted his guilt with respect to the second charge.

[2] It is apparent from the notes of proceedings that the accused had implicitly through his Counsel consented to the outstanding offence to be taken into consideration and this is even more clear when the note recorded that his Counsel explicitly referred to the relevant section relating to the taking of outstanding offence into consideration.

[3] Though it was not demonstrated how the Sessions Judge had erred in imposing the sentence, the order of imprisonment ought to be set aside because there was an inordinate delay in the despatch of the notes of proceedings to the accused. The accused was convicted in 1988 for an offence committed in 1983 and his appeal could only be disposed of in 1994 because the relevant file was misplaced by the lower Court and discovered only in 1994 and which discovery only came about after an ultimatum was issued by the High Court Judge. Considering that the accused had in the meanwhile found a gainful employment, he was certainly prejudiced by the delay in the supply of notes of proceedings. And he was no less prejudiced by the uncertainty of whether or not he would be imprisoned.

[Appeal allowed. Sentence of imprisonment set aside].

Cases referred to:

R v. Griffiths [1932] 23 Cr. App. R. 153 ***(foll)***
R v. Nelson [1967] 51 Cr. App. R. 98 ***(foll)***
Abang Zailan Bin Abang Zainal v. PP [1992] 1 MLJ 225 ***(foll)***

Hashim bin Pawanchee & Anor. v. PP [1988] 2 MLJ 66 ***(refd)***
Tan Hun Wah v. PP [1994] 1 AMR 3:113 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 171A, 173A

Other sources referred to:
Criminal Pleading Evidence & Practice, Archbold, 43rd Edn., Vol. 1, para. 5-30

For the appellant - Mirdin Mamdin; M/s. Chin Mirdin & Co.
For the public prosecutor - Saiful Edris bin Zainuddin, DPP

JUDGMENT

Ian H.C. Chin J:
This is an appeal against sentence handed down on 4 September 1988 and the lower Court had taken more than $5\ ^1/_2$ years to despatch the notes of proceedings to the accused resulting in the delay in the disposal of this appeal. Flady bin Dading ("the accused") faced the following two charges, viz:

> That...between 3 October 1983 and 8 October 1983, at the office of Department of Agriculture Tawau, at Jalan Kuhara Tawau, in the District of Tawau, in the State of Sabah, did knowingly give to an agent of government of Sabah, to wit, Ketua Pegawai Pertanian Tawau documents to wit, (i) a photostat copy of power of attorney dated 3 October 1983 (ii) a photostat copy of land title Country Lease No: 105396290 in respect of which his principal was interested and which documents contained statements which are false in material particulars to wit, that the said land title Country Lease No: 105396290 belongs to one Koh Yau Kim whereas the said land belongs to the following persons:
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> (i) Winsor Bin Marsah
> (ii) Jali Bin Winsor
> (iii) Noriah Bt Winsor
> (iv) Moet Bin Hariman
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> and which to your knowledge was intended to mislead his principal and that you have thereby committed an offence punishable under s. 4(c) of the Prevention of Corruption Act (Laws of Malaysia Act 57)." ("First Charge")
>
> and
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> That...between 8 September 1983 and 14 September 1983 at the Department of Agriculture, Jalan Kuhara, Tawau, in the District of Tawau, in the State of Sabah, did knowingly give to an agent of the Government of Sabah, to wit, Encik Lo Kiam Chiang @ Felix, Ketua Pegawai Pertanian, Tawau, documents, to wit, (i) a photostat copy of Power of Attorney dated 8 of September 1983 (ii) a photostat copy of land title No. CL 105349915 in respect of which his principal was interested and which documents contained statement which are false in material particulars, namely, that the said land CL 105349915 belong to Abdullah bin Burairah whereas the said land did not belong to Abdullah bin Burairah as it had been transferred to Chokeland Sdn. Bhd. on 14 October 1977 and which to your knowledge was intended to mislead his principal and that you have thereby committed an offence punishable under s. 4(c) of the Prevention of Corruption Act 1961 (Law of Malaysia No.57)." ("Second Charge").

In the course of the trial, the accused changed his plea and pleaded guilty to the first charge. The prosecuting officer then informed the Court that it "has no objection if the [second charge] be taken into consideration under s. 171A of the Criminal Procedure Code for the purpose of sentencing". The Court then read the second charge to the accused to which offence the accused admitted and Mr. Mirdin Mamdin, Counsel for the accused both here and below, was recorded to have said he had no objection to the charge being taken into consideration. The Court then convicted the accused of the first charge and the Court then said that the offence of the second charge must be taken into account when sentencing the accused. The accused was thereafter sentenced to a term of 3 months imprisonment and to a fine of RM4,000 together with a default sentence of 6 months jail. The jail sentence was stayed on the condition that the fine of RM4,000 be paid immediately after Counsel for the accused indicated that the accused wished to appeal with regard to the construction of s. 171A of the Criminal Procedure Code. For ease of reference, the said section is reproduced here:

> Section 171A.(i) Where in any criminal proceedings instituted by or on behalf of the public prosecutor the accused is found guilty of an offence, the Court, in determining and in passing sentence, may, with the consent of the prosecutor and the accused, take into consideration any other outstanding offence or offences which the accused admits to have committed:
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> Provided that, if any criminal proceedings are pending in respect of such outstanding offence or offences and such proceedings were not instituted by or on behalf of the public prosecutor, the Court shall first be satisfied that the person or authority by whom such proceedings were instituted consents to that course.

(ii) When consent is given as in subsection (i) and an outstanding offence is taken into consideration, the Court shall enter or cause an entry to that effect to be made on the record and upon sentence being pronounced the accused shall not, unless the conviction which has been had is set aside, be liable to be charged or tried of any such offence so taken into consideration.

The first of the grounds of appeal advanced by Mr. Midrin Mamdin is that the learned Sessions Judge "erred in law in not mentioning the charge that was taken into consideration but in taking the [accused] admission thereto which amounts to a plea whereas s. 171A of the Criminal Procedure Code does not provide for the mentioning of a charge and much less the taking of a plea." What has to be determined in relation to this contention is this: what steps should the Court take as soon as there is an agreement from all the parties concerned for an outstanding offence to be taken into consideration. The Criminal Procedure Code is silent. But it follows from the wordings - "offence or offences which the accused admits to have committed" (in s. 171A of the Criminal Procedure Code) that the Court must establish by inquiry that the accused admits his guilt with regard to the outstanding offence which, in this case, is the offence related in the second charge. To do this, the Court must in open Court ask the accused whether he admits the offence related in the second charge. This is what the learned Sessions Judge had done. Though there is no similar statutory provision, the common law of England applies. It was held in *R v. Griffiths* [1932] 23 Cr. App. R. 153 that it is important that it should be quite clear that the defendant admits his guilt with regard to the outstanding charges and he should be asked in open Court whether he does so. In *R. v. Nelson* [1967] 51 Cr. App. R. 98, the Court held that there should be an explicit inquiry by the Judge whether the defendant admits his guilt. I see no reason why those English cases should not apply; *a fortiori*, when s. 171A of the Criminal Procedure Code appears to be an embodiment of the common law practice of England with a slight difference. English cases were also followed by our Court in the case of *Abang Zailan bin Abang Zainal v PP* [1992]1 MLJ 225. The only difference between the English law and ours is that in England the offender can be subsequently charged with the offence which was taken into consideration and the offender cannot plead autrefois convict though the Court dealing with the offence on the second occasion would see to it that no additional punishment would be imposed (see Archbold on **Criminal Pleading Evidence & Practice,** 43rd Edn., Vol.1, para 5-30) whereas in Malaysia, the offender cannot be charged or tried again (see s. 171A(ii) of the Criminal Procedure Code, *supra*.). The difference does not change the procedure which the Court should adopt to ascertain whether the accused admits of the outstanding offence to be taken into consideration and does not make the English cases (*supra*) less applicable. Therefore, the learned sessions Judge did exactly what the law requires of him. There is, therefore, no substance in this ground of appeal.

The second ground of appeal is worded this way: 'Whereas s. 171A requires the [accused] to consent to the charge being taken into account, the learned Sessions Judge erred in law in equating the defence Counsel's non-objection to the Appellant's consent." I take that to mean that the accused is contending that he did not consent to the offence being taken into consideration. Admittedly, the notes of proceedings did not record the consent of the accused for the outstanding offence to be taken into consideration. See *Abang Zailan bin Abang Zainal v PP, supra,* for a statement of the law relating thereto. But the notes of proceedings, after the prosecuting officer had indicated that he was agreeable to have the second charge taken into consideration, read:

> Court: The [second charge] to be mentioned to accused. Charge read and explain to accused in Bahasa Malaysia. Accused understand charge and I admit it. En. Mirdin...No objetion for the charge to be taken into consideration. [Accused informed that the charge is to be taken into account when passing sentence concerning the [first charge.]
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> Allocution by Mr. Mirdin for accused.
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> In mitigation the accused has pleaded guilty to the charge of s. 4(c) of the Prevention of Corruption Act and [he] also understood s. 171A Criminal Procedure Code relating to outstanding offence to be taken into consideration ...
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> In conclusion through me, the accused beg the Court, given that he's [pleaded] guilty and asking the Court to exercise the power under s. 171A of the Criminal Procedure Code, we now beg the Court to invoke s. 1 73A ...

It is apparent from the notes of proceedings that the accused had implicitly through his Counsel consented to the outstanding offence to be taken

into consideration and this is even more clear when the note recorded that his Counsel explicitly referred to the section relating to the taking of outstanding offence into consideration. I also see no merit in this ground of appeal. In the course of arguing this appeal and after I have pointed out the folly of his pursuit, which is that in the event the Court upholds his submission the accused may face a trial of the outstanding offence which the accused said he did not agree to be taken into consideration, Mr. Mirdin Mamdin then said he is not pursuing this ground of appeal.

The remaining grounds of appeal are in substance all directed at the question of the length of sentence. It must follow that when a Court takes into consideration an outstanding offence, the sentence for which the accused was actually convicted may be longer on account of the outstanding offence. There is no irregularity in that. See *Batchelor* [1952] 36 Cr. App. R. 64. Of course, consideration must also be accorded to the accused for admitting to the other offence which saved time and money. See *Hashim bin Pawanchee & Anor. v. PP* [1988] 2 MLJ 66. Though it was not demonstrated how the learned Sessions Judge had erred in imposing the sentence he did, I nevertheless set aside the order of imprisonment because there was inordinate delay in the despatch of the notes of proceedings to the accused. The offence took place in 1983. The accused was convicted on 14 September 1988 and he appealed but the lower Court misplaced the file until I issued an ultimatum which resulted in the recovery of the file but, by then it was 1994. In the meantime, the accused had found gainful employment. If an accused can be prejudiced by the long delay by the Court in supplying the grounds of decision, as held in the case of *Tan Hun Wah v. PP* [1994] 1 AMR 3:113, the accused is also prejudiced by the delay in this case in the supply of the notes of proceedings to the accused. The accused was certainly prejudiced with this uncertainty of whether he will be imprisoned or not. It was because of this that I reluctantly, reluctantly because civil savants should normally go to jail if convicted of corruption offences, set aside the sentence of imprisonment. The fine, which has already been paid, stays. Though, there was hardly any disagreement in this appeal which was heard this morning, I thought it best to reduce into writing what I think is the pertinent law relating to the matter herein.

HAJI BAKTI BIN AMUALI

v.

JIMMY WONG SZE PHIN & 2 ORS.

HIGH COURT BORNEO, TAWAU
TUAN IAN H.C. CHIN J.
[CIVIL SUIT NO. T. 7 OF 1991]
30 APRIL 1994

CONTRACT: Plaintiff purportedly entering into joint venture agreement with 1st defendant to cultivate plaintiff's land - Agreement containing reference to a sale - Plaintiff granting power of attorney to 1st defendant to deal with land - Agreement to sell land and divide proceeds after land developed - 1st defendant failing to pay agreed sum under agreement - Revocation of power of attorney - Sale of land to 2nd and 3rd defendants without plaintiff's consent - Whether the agreement entered into between the plaintiff and 1st defendant was a joint venture agreement or a sale and purchase agreement - Whether agreement illegal - Whether against public policy - Whether agreement tainted by fraud - Whether power of attorney lawfully revoked - Consideration of s. 24 Contracts Act 1950 - Sections 34(1), 88 & 171(A)(1) of the Sabah Land Ordinance.

PRACTICE & PROCEDURE: Breach of contract - Whether plaintiff's action time barred - Limitation Ordinance item 93 of the Schedule - O. 59 r. 8 Rules of the High Court 1980.

WORDS & PHRASES: Sabah Land Ordinance (Cap. 68), s. 4 - "transfer", "memorandum".

On 26 September 1983 the plaintiff entered into what was purported to be a joint venture agreement with the 1st defendant to cultivate his land for which the 1st defendant agreed to pay the plaintiff RM30,000. On the same date the plaintiff executed a power of attorney in favour of the 1st defendant to enable him to deal with all matters in connection with the land. It was also agreed between the parties that the land would be eventually sold after it had been fully developed and the proceeds divided between them. The 1st defendant failed to make the agreed payment and sold the land to the 2nd and 3rd defendants without the plaintiff's consent.

The plaintiff admitted signing a document dated 27 September 1983 (P1) containing an agreement for the resale of the land and which made reference to a sale and purchase agreement dated 26 September 1983 (D1). He also admitted signing the last pages of D1 and a power of